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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re N.Z., a Person Coming
Under the Juvenile Court Law.

B291712

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Los Angeles County
Super. Ct. No. DK00133D

Plaintiff and Respondent,

v.

M.Z.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Daniel Zeke Zeidler, Judge. Affirmed.

Megan Turkat Schirn, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles,
Assistant County Counsel, and Kim Nemoy, Principal Deputy
County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Mother M.Z. (mother) appeals from the juvenile court's order terminating her parental rights under Welfare and Institutions Code section 366.26¹ and setting adoption as the permanent plan for her 11-year-old son, N.Z. (minor). Mother challenges the court's finding that the beneficial parent-child relationship bar to adoption (§ 366.26, subd. (c)(1)(B)(i)) does not apply. The court determined that although mother consistently visited the minor during the four years of the dependency proceedings and the two have a strong bond, the benefit of maintaining the parent-child bond does not outweigh the benefits adoption would provide the minor in this case. That finding, which rests not only upon the written reports from the Department of Children and Family Services (Department) but also upon testimony by mother and the minor, is supported by substantial evidence. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. General Allegations

This family originally came to the attention of the Department in mid-2013. At that time, mother and her husband, J.Z. (father), were living week-to-week in hotels with M.Z. (then

¹ All undesignated statutory references are to the Welfare and Institutions Code.

age seven) and the minor (then age five). The parents' other two minor children, C.Z. and H.Z., were living with a relative and their adult son was living with a different relative. Only mother and the minor are involved in the present appeal.

The Department responded to a referral indicating mother and father were having sexual intercourse in front of their children. After confirming that report, the Department also learned father had physically abused M.Z. on multiple prior occasions. The Department subsequently filed a petition as to all four minor children containing allegations under section 300, subdivision (a) [mother's failure to protect M.Z. from physical abuse], subdivision (b) [father's physical abuse of M.Z., and the parents' sexual intercourse in front of the children], subdivision (d) [the parents' sexual intercourse in front of the children], and subdivision (j) [father's abuse of a sibling]. In September 2013, the children were removed from parental custody. The minor was placed in a foster home where he remained for four years.

In October 2013, the Department filed an amended petition containing additional allegations of physical abuse and inappropriate discipline. And in November 2013, the court sustained seven allegations under section 300, subdivisions (a), (b), and (j), relating to physical abuse, inappropriate discipline, and exposure to sexual activity.

2. Family Reunification Efforts

At the adjudication and disposition hearing, the court ordered a minimum of one hour of monitored visitation per week for mother and father. Throughout the reunification period, mother visited the minor regularly on a weekly basis and without incident. And the minor consistently told Department

caseworkers that he enjoyed visiting with mother and missed her. Mother also called the minor frequently, sometimes on a daily basis (though the minor did not always take her calls.) In May 2014, mother and father were ordered not to visit the children at the same time.

In November 2014, the Department recommended transitioning mother to unmonitored visitation and the court agreed. The minor continued to enjoy his visits with mother. The court ordered that father's visitation would remain monitored and further ordered that father could not visit the children with mother, or be informed of the date, time or location of mother's visitation.

The Department's April 2015 report indicated that the parents appeared to remain in a committed relationship and were possibly living together, despite their contrary representations to the Department. Neither parent had fully complied with the case plan and mother "[was] not able to problem solve or protect the children during her visits[.]" The court terminated reunification services for both parents in April 2015 and set a hearing under section 366.26 in August 2015. But because the Department was unable to locate an adoptive family for the minor quickly, that hearing did not take place as scheduled.

3. Events After Termination of Reunification Services

During the summer of 2015, the minor attended a special camp and met potential adoptive parents, Mr. and Mrs. T. The T. family began visiting with the minor every other weekend and progressed to overnight weekend visits in early 2016. Mr. and Mrs. T. hoped the minor would be placed in their home, with the goal of adoption.

Mother continued to visit the minor regularly and the minor enjoyed visits with her and other family members. However, in October 2015, the Department filed a petition under section 388 seeking monitored visitation for mother because she had been allowing father to visit with the children during her unmonitored time, contrary to the court's prior order.

In 2016, mother filed a series of petitions under section 388 seeking the minor's placement in her home with family maintenance services or, in the alternative, unmonitored visitation with the minor. The court ordered unmonitored visitation in May 2016. By August 2016, the Department recommended the minor begin overnight visitation with mother, presumably to transition to placement in her home. The Department also stopped adoption placement and recruitment efforts and the potential adoptive parents stopped visiting with the minor. Following the Department's recommendation, the court granted mother's request for overnight visitation and the minor began to stay at mother's home every Friday night to Sunday night. In early October 2016, the minor still wanted to live with mother and the Department reported it was "optimistic that [the minor] will do well transitioning living back with his mother," recommended further family therapy sessions, and also recommended the minor be placed with mother.

Unfortunately, things took a turn for the worse in late October 2016. The Department filed a petition under section 387 regarding the minor's sister, M.Z., after she disclosed father was staying overnight with mother and had hit M.Z. in the head. The court removed M.Z. from mother's home and ordered mother's visitation with the minor to be monitored by the Department with discretion to liberalize.

In its December 2016 report, the Department stated that in October 2016, the minor's teacher observed him to be very tired on Mondays. The minor admitted staying up very late playing video games while staying overnight at mother's house on weekends. The Department expressed concern that mother lacked the capacity to enforce bedtime and was not providing adequate oversight and supervision. In addition, the Department was critical of mother's food choices. The minor said mother gave him "junk-food, like hot dogs, pop-tarts, and tuna sandwiches, I don't even like tuna." More troubling, after M.Z. bit the minor's arm during a visit, mother told the minor to hide the bite marks. Also, mother's weekly visits became uninspired. Generally, mother would eat while the minor played on his Nintendo DS.

In a last minute information to the court in December 2016, the Department stated it believed the parents were continuing to mislead the Department regarding father's residence and visits to mother's home. In light of those actions, and the fact that father abused M.Z. while at mother's home (in violation of the court's prior visitation orders), the Department concluded mother was continuing to demonstrate negligence and was failing to protect the children from father. The Department recommended the court deny further reunification services, deny mother's most recent section 388 petition, and set a hearing under section 366.26. In keeping with the Department's recommendation, the court denied mother's section 388 petition, sustained the Department's section 387 petition as to M.Z., and ordered monitored visitation for mother with the minor once a week.

4. Identification of a Potential Adoptive Family

The Department was unable to find a potential adoptive family for the minor until September 2017. After several

introductory meetings with the prospective adoptive parents in November 2017 and overnight visits in December 2017, the Department placed the minor in the potential adoptive home in early January 2018. Although the minor had some difficulty with the transition, within a few weeks he told a Department caseworker “he really likes living with the prospective adoptive applicants” and “would like to be adopted” by them. In March 2018, the Department asked the court to continue the .26 hearing to allow the minor to be in the potential adoptive placement for a few more months before the court determined the permanent plan.

During this time, phone calls from mother often triggered the minor to become irritable and during one phone call in December 2017 he threw away the phone twice during a call. He also began declining to talk to mother on the phone. The Department was concerned that mother’s daily phone calls were negatively impacting the bonding process between the minor and his potential adoptive parents and therefore scheduled her calls on two evenings per week.

Mother continued to visit the minor weekly. But although mother tried to help the minor with his homework during their visits, he was resistant and mother was unable to persuade him to do his work.

5. The Permanency Planning Hearing and Ruling

The court conducted the hearing under section 366.26 on July 24 and July 27, 2018. In addition to receiving the Department’s reports into evidence, the court heard testimony from mother and the minor. In response to questioning by the court, the minor said if he got to decide what to do, he would not be adopted because he loved his parents. He also said he was

feeling good at the home of his potential adoptive parents and loved them as well. When asked about mother, he said he visited with her once a week and did not want to visit her more frequently. Mother testified she did not want the minor to be adopted because she believed she still had the ability to take care of him and wanted him to be with her.

The court acknowledged mother had maintained consistent contact with the minor but concluded the relationship did not outweigh the benefits of adoption. The court then found the minor to be adoptable and terminated both parents' parental rights with adoption as the permanent plan.

Mother appeals.

DISCUSSION

Mother contends the court erred by finding that the beneficial parent-child relationship exception to the mandatory termination of parental rights after failure to reunify (§ 366.26, subd. (c)(1)(B)(i)) does not apply in this case. We disagree.

1. Standard of Review

We review the factual basis for the trial court's finding of adoptability and termination of parental rights for substantial evidence. (See *In re Jasmon O.* (1994) 8 Cal.4th 398, 422–423.) We “presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) The parent has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order. (See *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

A few courts, including Division Seven of this court, have articulated a composite standard of review in which both the substantial evidence and abuse of discretion standards apply. (*In re K.P.* (2012) 203 Cal.App.4th 614, 621–622.) Summarizing a prior decision, *In re Bailey J.* (2010) 189 Cal.App.4th 1308, our colleagues “observed that the juvenile court’s decision whether an adoption exception applies involves two component determinations: a factual and a discretionary one. The first determination—most commonly whether a beneficial parental or sibling relationship exists, although section 366.26 does contain other exceptions—is, because of its factual nature, properly reviewed for substantial evidence. [Citation.] The second determination in the exception analysis is whether the existence of that relationship or other specified statutory circumstance constitutes ‘a compelling reason for determining that termination would be detrimental to the child.’ [Citations.] This ‘“quintessentially” discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption,’ is appropriately reviewed under the deferential abuse of discretion standard. [Citation.]” (*In re K.P.*, at pp. 621–622.)

On the record before us, we would affirm under either standard. (And see *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [explaining in this context practical differences between substantial evidence and abuse of discretion standards are minor].)

2. Dependency Statutes

“The Legislature has declared that California has an interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful. [Citations.]” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.) To implement adoption as the permanent plan, the court must find, by clear and convincing evidence, that the minor is likely to be adopted if parental rights are terminated. (§ 366.26, subd. (c)(1).) Then, in the absence of evidence that termination of parental rights would be detrimental to the child under statutorily specified exceptions (§ 366.26, subd. (c)(1)(A) & (B)), the juvenile court “shall terminate parental rights” (§ 366.26, subd. (c)(1)).

Pertinent here, section 366.26 provides an exception to the general legislative preference for adoption when “[t]he court finds a compelling reason for determining that termination would be detrimental to the child” (§ 366.26, subd. (c)(1)(B)) because “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) But “[b]ecause a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

In view of the Legislature’s stated preferences, our courts have held that the scope of the beneficial parent-child relationship exception is quite limited. “To overcome the preference for adoption and avoid termination of the natural parent’s rights, the parent must show that severing the natural

parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed. [Citations.] A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent. [Citation.] A child who has been adjudged a dependent of the juvenile court should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree, but that does not meet the child's need for a parent. [Citation.]" (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) In analyzing whether the parent-child relationship is important and beneficial, a court must examine: (1) the age of the child, (2) the portion of the child's life spent in the parent's custody, (3) the positive or negative effect of interaction, and (4) the child's particular needs. (*Id.* at p. 467.)

The showing required to avoid termination of parental rights is considerable. It is not enough for the natural parent to show regular, pleasant visits with the child. (See *In re C.F.* (2011) 193 Cal.App.4th 549, 559 ["[C]ontact between parent and child will always 'confer some incidental benefit to the child,' but that is insufficient to meet the standard"].) The relationship must reflect a significant bond, the termination of which would be detrimental to the child.

3. The court did not err in terminating mother's parental rights.

Mother does not challenge the court's finding that the minor is adoptable. Nor does the Department challenge the court's finding that mother maintained regular contact with the

minor throughout these proceedings. Thus, the only issue for our consideration is whether mother established the minor would benefit from a continuing relationship with her.

“The ‘benefit’ prong of the [parent-child relationship] exception requires the parent to prove his or her relationship with the child ‘promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.’ [Citations.] No matter how loving and frequent the contact, and notwithstanding the existence of an ‘emotional bond’ with the child, ‘the parents must show that they occupy “a parental role” in the child’s life.’ [Citations.]” (*In re K.P.*, *supra*, 203 Cal.App.4th at p. 621.) This “significant attachment from child to parent results from the adult’s attention to the child’s needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) This prong is not satisfied by a showing that “some detriment” to the child will result from the termination of parental rights. (*In re Logan B.* (2016) 3 Cal.App.5th 1000, 1013, fn. 9; *In re Breanna S.* (2017) 8 Cal.App.5th 636, 646.)

Citing *In re Scott B.* (2010) 188 Cal.App.4th 452 (*Scott B.*), mother argues the court failed to properly consider evidence she contends demonstrates that termination of her parental rights will be detrimental to the minor. *Scott B.* was an exceptional case in which the Court of Appeal concluded the juvenile court erred in terminating the mother’s parental rights. And although there are some factual similarities between *Scott B.* and the present case, there are also significant differences: there, the mother had

significant health problems and developmental needs which impacted her ability to care for the child; the child had been diagnosed with autism and had significant difficulty adjusting to new environments; and the potential adoptive mother was unwilling to commit to regular contact between the child and the mother following the adoption. (*Id.* at pp. 455–456, 459, 461, 471–473.) Because these circumstances are substantially different than the present case, we find mother’s reliance on *Scott B.* to be misplaced.

Essentially, mother invites us to reweigh the facts before the juvenile court and give greater weight to the facts she believes counsel against terminating her parental rights. For example, mother emphasizes she has complied with her case plan by receiving counseling and medication, and has worked hard to become a better parent. And she asks us to determine that legal guardianship, rather than adoption, should be the permanent plan for the minor.

As our factual summary indicates, mother has made prolonged and consistent efforts in these proceedings and her efforts very nearly resulted in the minor being returned to her care. Ultimately, however, mother was unable to separate herself from father and therefore failed to correct the primary condition that required the minor’s removal. The court properly weighed these and other factors and concluded that, on balance, the benefits of adoption outweigh the benefit of maintaining mother’s parental rights in this case. As a reviewing court, “[i]t is not our function, of course, to reweigh the evidence or express our independent judgment on the issues before the trial court.” (*In re Jasmon O.*, *supra*, 8 Cal.4th at p. 423.)

Mother also contends the court “abused its discretion by failing to consider the child’s wishes” regarding adoption. And she asserts the minor “clearly expressed his preference was not to be adopted.” We reject this argument for two reasons.

First, section 366.26 only authorizes a court to refuse to terminate parental rights after a finding of adoptability if the child is 12 years of age or older and objects to the termination of parental rights. (§ 366.26, subd. (c)(1)(B)(ii).) As the minor is only 11 years old, this statutory provision does not apply.

Second, and in any event, although the minor plainly had mixed feelings about being adopted the court did not, as mother suggests, ignore the minor’s preference. Rather, the court explored the issue at the .26 hearing. In response to questioning by the court, the minor said if he got to decide what to do, he would not be adopted because he loved his parents. But the minor also said he was feeling good at the home of his potential adoptive parents and loved them as well. And according to the Department, a few weeks after placement with the potential adoptive parents, the minor said to a social worker that “he really likes living with the prospective adoptive applicants” and “would like to be adopted” by them. When asked about mother specifically, the minor said he visited with her once a week and did not want to visit her more frequently, nor did he want to speak with her more frequently on the phone.

These facts, and others, were thoroughly considered by the court and provide substantial evidence for the court’s conclusion that mother did not occupy a parental role so substantial that it would be detrimental for the court to terminate mother’s parental rights and set adoption as the permanent plan.

DISPOSITION

The order terminating mother's parental rights and setting adoption as the permanent plan for the minor is affirmed.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.